

PUBLIC EMPLOYMENT RELATIONS BOARD

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Law Revision Commission
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October 1, 2015

Barbara S. Gaal, Esq.
Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice and
Other Misconduct – Study K-402.

Dear Ms. Gaal and Members of the Commission:

The Public Employment Relations Board (PERB) submits the below comments in response to Study K-402, and the Commission's legislative recommendations that may follow. In particular, PERB urges the Commission to preserve the confidentiality afforded to PERB's mediators, as a weakening of mediator confidentiality will adversely affect their ability to resolve labor disputes.

As background, PERB is a quasi-judicial agency created by the Legislature to oversee public sector collective bargaining in California. PERB administers eight collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties. Within PERB is the State Mediation and Conciliation Service (SMCS), which provides mediation services to primarily public and some private constituents. It is noteworthy that our mediators are public employees. Among other things, SMCS conducts mediations to: (1) end strikes and other severe job actions; (2) resolve collective bargaining agreement disputes; (3) resolve grievances arising from alleged violations of collective bargaining agreements; and (4) facilitate agreement regarding the conduct of representation elections. Similarly, PERB's Regional Attorneys conduct mediations, known as Informal Conferences, to resolve unfair practice charges. Thus, PERB mediators play an important role in maintaining harmonious labor-management relations in both the public and private sectors of the state.

For a mediator and the participants to understand the central issues, the motivations, and the risks of not resolving their dispute, the parties must be assured that the mediator will not divulge their confidential disclosures. Trust and candid discussions are essential to opening constructive and creative dialogue and to enabling parties to discover ways to resolve their disputes independent of a more formal process such as arbitration or the judicial system. While confidentiality serves the important role of fostering candid dialogue between the parties and the mediator, it is also a critical element for maintaining a mediator's impartiality. Thus, impartiality and confidentiality walk hand-in-hand. Were SMCS to lose the promise of

absolute confidentiality, it risks losing its neutrality in the eyes of our constituents. The result would be failed mediations and costly and disruptive labor disputes.

PERB recognizes that mediator confidentiality may deprive a future litigant of needed evidence, but as explained in *NLRB v. Joseph Macaluso, Inc.* (9th Cir. 1980) 618 F.2d 51 (*Macaluso*), the public interest protected by the confidentiality rules—as applied to mediators—is substantial and outweighs those rare instances where a litigant may need evidence from a mediator. In *Macaluso*, the court was asked to decide whether the National Labor Relations Board (NLRB) erred in disallowing, through the revocation of a subpoena, the testimony of a Federal Mediation and Conciliation Service (FMCS) mediator as to a crucial fact occurring in his presence. The court first acknowledged that the NLRB's revocation of the mediator's subpoena conflicted with “the fundamental principle of Anglo-American law that the public is entitled to every person's evidence.” (*Id.* at p. 54, citing to *Branzburg v. Hayes* (1972) 408 U.S. 665, 688.) The court further explained that:

The public interest protected by revocation must be substantial if it is to cause us to “concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.” (*Id.*, citing to 1 Wigmore, Evidence § 11, at 296 (1940).)

The court—in holding that the need for absolute confidentiality in mediation outweighed a litigant's need for evidence—relied in large part on the important role the NLRB played in maintaining labor harmony. In particular, the court stated that “federal mediation has become a substantial contributor to industrial peace in the United States.” (*Id.* at p. 55.) The court further determined that “[a]ny activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation.” (*Id.*)

PERB is the California public sector NLRB equivalent and shares the same important mission as to our state's public entities. Likewise, SMCS mediators serve the same vital role and function as their federal counterparts. Therefore, the conclusions reached by the court in *Macaluso*, that the loss of mediation confidentiality would inevitably impair or destroy the usefulness of FMCS in future proceedings and threaten industrial stability, are equally applicable to the mediations conducted by PERB.

Professor Ellen E. Deason described the problem of removing mediator confidentiality as follows:

A mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality. It is true that this departure from neutrality is not personal or intentional when a mediator is compelled to testify under subpoena. Nonetheless, if a mediator

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can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.

(Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?* (2001) 85 Marquette L.Rev. 79.)

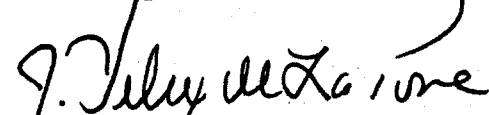
In the context of PERB's mediations, the damage to a mediator's neutrality is exacerbated because our mediators routinely work with many of the same labor attorneys and/or representatives for labor and management. It is common for these advocates to participate in multiple mediations each year on behalf of their clients. Accordingly, the perceived loss of neutrality in one labor dispute will have a ripple effect that may harm mediation efforts statewide in future cases.

Presently, PERB mediators enjoy absolute confidentiality through California Evidence Code, sections 703.5, 958, and 1119. These statutes are crucial to PERB's ability to resolve labor disputes. Accordingly, PERB urges the Commission to consider the unique and important role that our mediators play in resolving the state's labor disputes, and the damage that may ensue if mediator confidentiality is eliminated or diminished.

Sincerely,



LORETTA VAN DER POL
Chief, State Mediation and Conciliation Service
Public Employment Relations Board



J. FELIX DE LA TORRE
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